

STATE OF NORTH DAKOTA
SEED ARBITRATION BOARD

IN THE MATTER OF:)	
)	
Nitschke, et al. v. Agway Seed, Inc.)	PROPOSED
)	ARBITRATION
.....		DECISION

On December 21, 1999, the North Dakota Seed Arbitration Board (“Board”) received a grievance letter (request for arbitration) from Ms. Sarah Vogel, attorney, on behalf of many named Petitioners, submitting a defective seed dispute with the Respondent, Agway, Inc. (“Agway” or “Respondent”) to the Board. Ms. Vogel has updated the list of Petitions three times since, on January 19, February 7, and February 10, 2000. There are now sixty-three Petitioners. *See* Petitioners Written Statement submitted to the Board by Ms. Vogel and Attorney Damian Huettl on behalf of the Petitioners on the date of the hearing, February 18, 2000. This is the third group submitting a grievance to the Board in regard to the same defective seed dispute with Agway. The first two groups had hearings on December 21, 1999. The three groups are sometimes referred to as Groups A (Jorgenson group), B (Loraas group), and C (Nitschke group). Groups A and B were consolidated for hearing on December 21. The Board’s decision on those two grievances is pending.

On January 4, 2000, the Board requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings to conduct an arbitration hearing and to issue a proposed arbitration decision for the Board to consider in issuing its nonbinding recommendation for resolution of a dispute under N.D.C.C. § 4-09-20.2. On January 19, 2000, ALJ Allen C. Hoberg was designated.

On January 18, 2000, the Board issued a Notice of Hearing. *See* letter notice addressed to counsel for the Petitioners and Respondent. The notice included copies of the hearing guidelines and hearing format. The notice scheduled a February 18, 2000, arbitration hearing. The hearing was held as scheduled in the Brynhild Haugland Room, State Capitol, Bismarck, North Dakota. Many, if not all, of the Petitioners were present. A head count was not taken, however. They were represented at the hearing by Ms. Vogel and Mr. Huettl. Ms. Vogel handled most of the presentation for the Petitioners. Some of the actual Petitioners testified, including Jeff Nitschke, Steve Jorgenson, Robin Weisz, and Ron Hegvik. The Respondent was present at the hearing through various officers and employees. The Respondent was represented at the hearing by Mr. Duane Breitling, Fargo. The Petitioners submitted a written statement (facts and argument) with sixteen exhibits attached (Exhibits 1-16) (“Petitioner’s Written Statement”). The Petitioners also offered Exhibits 17 and 18 at the hearing. All of the Petitioners’ submissions were considered. The Petitioners also submitted a large blue packet of fact specific documentation from each of the sixty-three growers who are Petitioners in this matter (Baby Blue cover), which was also considered (“Blue Packet”). The Respondent submitted a written statement (facts and argument) with twelve attachments (“Respondent’s Written Statement”). Respondents also offered Exhibit 13 at the hearing. They also offered Exhibits 14 and 15 which were to be late-filed (actually late-filed Exhibits 14 and 15 were never submitted under those numbers – see below for Agway’s supplemental submission). Also, the Respondent agreed to supplement its attachments 10-12 with 10A, 11A, and 12A, which supplemental materials were to be late-filed (actually these late filed supplemental exhibits were also not submitted under those numbers – see below for Agway’s supplemental submission). All the Respondent’s submissions were considered.

The ALJ agreed to hold open the record of the hearing until one week after the late-filed exhibits were received. That deadline was later extended at the request of counsel for the Petitioners. On March 6, 2000, the ALJ received Agway's March 3, 2000, Supplementation and Response, which included both copies of exhibits already before the Board and additional exhibits (the exhibits attached to the document were marked 1-18). On March 20, 2000, the ALJ received Agway's May 17 letter enclosing a readable copy of a letter that was a part of Exhibit 2 attached to Agway's March 3 document. On March 27, 2000, the ALJ received Petitioner's Response to Agway's Supplementation and Response (hand delivered). This document contained Exhibits 1-10. These additional documents and their attached exhibits received after the hearing were also considered.

Both parties asked the Board to take official notice of the record from the proceedings concerning Groups A and B, held on December 21, 1999. The ALJ takes official notice of that record and recommends that the Board do so.

The Petitioners in this matter allege an Agway confection sunflower seed, Royal Hybrid 2073 ("2073") (several seed lots of 2073, particularly those seed lots consisting of large and extra large seed), did not properly germinate. They further allege that 2073 had poor emergence, poor vigor, thin stands, and an unusual number of deformities. As a result, the Petitioners allege, all sunflower growers involved in the dispute, *i.e.*, all the Petitioners, experienced significantly lower yields on their 2073 fields than on comparable nearby fields planted with other seed varieties using similar farming practices. The Petitioners further allege that Agway is responsible for the seed and liable to the Petitioners in the amount \$1,824,725.44 for total damages resulting from the defective 2073 seed. The issues, then, are whether the evidence shows, by the greater weight of

the evidence, that Agway's 2073 is defective seed, and whether Agway is responsible for defective seed and liable to the Petitioners in the amount alleged.

Essentially, the ALJ and Board heard presentations by counsel for the Petitioners and some of the Petitioners, counsel for the Respondents, questioning of some of the Petitioners and some Agway representatives, discussion by the parties regarding unresolved issues (no issues were resolved at the hearing), and final closing comment by counsel for the Petitioners and Respondent. The Board and the ALJ asked some questions at the hearing. Board members present included members Tweed, Schlosser, Gustafson, and Knudson. Member Ashley was not present. However, he was present for the hearings on the consolidated matter regarding the other two groups and will participate in the decisionmaking in regard to all three groups.

On March 23, 2000, the ALJ received a letter addressed to him and others from Ms. Vogel and Mr. Huettl. The letter notes that there have been three groups of petitioners filing a seed arbitration claim against Agway and there may be more claims filed. They note that a likely scenario is that all of the farmers (the current petitioners in the three groups and other farmers with claims) together will file a civil action against Agway. They ask the Board to rule that its arbitration decision in this matter and the matter for Groups A and B be issued on behalf of "all farmers who have presented a claim or may in the future present a claim" They ask the Board to make a statement that "further seed arbitration hearings are not a prerequisite to institution of a court action on behalf of all affected farmers." N.D.C.C. § 4-09-20.2 requires the Board to arbitrate a dispute by means of a hearing and to make a nonbinding recommendation for resolution of a dispute for all disputes involving a seed transaction when a petition regarding the dispute is filed with the Commissioner of Agriculture. N.D. Admin. Code § 100-02-01-01(2) states that "seed arbitration is prerequisite to any civil action." The Board currently has before it

only three petitions involving Groups, A, B, and C; it does not have before it any other petitions from any other farmers. Therefore, the Board has no jurisdiction to issue any decision affecting Agway and any other farmers who have not petitioned the Commissioner. Under the law, *i.e.*, N.D.C.C. § 4-09-20.2 and N.D. Admin. Code title 100, the Board can neither include other farmers in an administrative matter when those farmers have not submitted the required petition nor state that seed arbitration is not a prerequisite to the filing of a civil action.

Based on the evidence presented at the arbitration hearing, the discussion, and the closing arguments or comments, as well as the record of the arbitration hearing on December 21, 1999, concerning Groups A and B, the administrative law judge makes the following recommended findings.

RECOMMENDED FINDINGS

1. The 63 Petitioners (the Respondents say there are 62) are all farmers or grower groups in North Dakota that farm and grow confection sunflowers at various locations around the state. Each of these farmers or growers groups (hereinafter “Petitioners” or “growers”) purchased 2073 either directly from Agway or indirectly from Agway through distributors or private labelers for planting in the spring of 1999. Some growers (five) contracted directly with Agway. Some growers (20) contracted with Agway through cooperating elevators. Some growers (37) purchased their sunflower seed from other processor, local elevators, or dealers. (These numbers are Respondent’s numbers – again, their total is 62, not 63 as Petitioners claim.)

2. Although the evidence about the farming practices of each Petitioner is not certain, the evidence appears to show that each of the Petitioners grew 2073 using rather similar, normal farming practices, just as they used similar, normal farming practices to grow other confection sunflower seed in the 1999 crop season.

3. Other growers besides the 63 Petitioners in Group C experienced a similar situation with regard to 2073. *See* Groups A and B materials. There are approximately 11 growers in Group A, from around the Leeds, North Dakota area. There are approximately 15 growers in Group B, from around the Langdon, North Dakota area. *See* Exhibit A, Petitioner's Written Presentation on December 21, 1999 (Exhibit 6). The three groups represent a wide variety of farmers from various locations in North Dakota encompassing land mostly in east and east-central North Dakota but from the Canadian border almost to South Dakota. Most of these 63 growers in Group C have considerable experience in growing sunflowers.

4. Agway is one of the nation's largest agricultural cooperatives. Agway has a sunflower and grain processing plant in Grandin, North Dakota. Agway in Grandin is the largest confection sunflower processing plant in the United States. Agway has a plant-breeding program that has for more than 25 years developed improved confection sunflower hybrids for sale and planting. Agway developed and then sold 2073. Agway sold 2073 either directly or indirectly to all of the 63 Petitioners.

5. The acreage of 2073 planted in North Dakota expanded from 7,000 acres in crop year 1998 to 100,000 acres in 1999.

6. The seed in question in this matter, that was planted in crop year 1998 and 1999 in North Dakota was seed that was grown for seed in 1997. It would have been in storage after harvest in 1997 until sold to the Petitioners for growing in 1999.

7. 2073 performed well under field conditions in 1998. A "stay green" or "slow dry down" problem was about the only major complaint received by Agway from 1998 growers.

8. Apparently, 2073 did perform well for some growers in 1999, also. To some extent, the same seed lots that were used in fields with poor plant population produced normal emergence and stands in other fields.

9. Although Agway has shown that 2073 performed well both in yield tests and under field conditions, it did not perform well for the 63 Petitioners in 1999.

10. In the early growing season in 1999 there was a shortage of confection sunflower seed. Some growers ordered other varieties than 2073 but were given 2073 anyway. In Agway's Sunflower Contract that some growers entered into with Agway, Agway is allowed to substitute seed varieties under certain circumstances, which it sometimes did in 1999, substituting 2073. In other words, for some contract growers Agway changed seed varieties, substituting 2073 because other varieties preferred by the grower were not available. However, some growers wished to plant 2073 in 1999 because of its good results in 1998.

11. Agway admits to inconsistent germination test results from testing before it began selling 2073 in 1999, but it felt comfortable in median results and asked that some previously tagged 2073 be re-tagged at an 85 rather than a 90 percent germination rate. Agway had "numerous customers anxiously awaiting shipment" of sunflower seed. Agway Supplementation and Response, at 2 (March 26, 1999, letter).

12. In 1999, each of these 63 Petitioners, each a 2073 grower, experienced that the 2073 sunflower seeds had poor emergence, poor vigor, thin stands, and an unusual number of deformities, and, as a result, had significantly lower yields when compared to other comparable sunflower fields planted to different varieties in nearby fields by these growers or by other growers.

13. Each of the 63 Petitioners has specifically demonstrated a loss from the resulting lower yields. *See* Blue Packet for specific grower information. *See*, also, Exhibit 1 in Petitioners' Written Statement.

14. 26 growers experienced a loss in yield (lbs./acre) of above 1000 lbs./acre from planting 2073 (up to a 1702 lbs./acre loss for one grower) as compared to other comparable yield experience for other varieties. *Id.* The remainder of the 63 growers experienced a yield loss of from 55 lbs./acre to just under 1000 lbs./acre, most in the 500-1000 lbs./acre yield loss range. *Id.* For example, Lowell Berntson's Agway 3733 sunflower yielded 1156 lbs./acre and his Agway 2073 sunflower, right next to it on different portions of the same field, yielded 513 lbs./acre. He had stand counts of 17,300 plants per acre ("PPA") for the 3733 and stand counts of 8,300 and 10,000 PPA for the 2073. There is evidence that even with significantly lower stand counts (PPA) sunflower yields can still be adequate. However, the Petitioners experienced considerable loss in yield individually, and as a group, from stand counts that were not adequate, individually, and as a group.

15. Agronomists and other crop consultants, as well as Agway specialists inspected some of the Petitioners' 2073 fields.

16. One consultant from Prairie Ag Service, Inc. in Fordville, North Dakota, who has been a sunflower consultant for 13 years said in regard to 2073 fields that he had "never had a field of sunflowers that has had this high of emergence problems." Blue Packet, grower #19. He said that he saw "poor seed germination and very weak vigor." *Id.* Other consultants inspecting some of the growers fields were Simplot Soilbuilders, Langdon, Minn-Dak Growers, Ltd., Grand Forks, and North Dakota State University Extension Service (Griggs County Extension Agent). The growers and the consultants inspecting the 2073 fields early on (early July) found many

seeds that had just not germinated (dead seed), many rotten seeds, low stands of plants, numerous unhealthy plants, yet they generally did not find evidence of insect damage or disease. Poor germination and no or poor vigor, as well as low to very low stand (poor stand) problems seemed to be the case in all of the 2073 fields checked. There was some evidence of downy mildew present in many of the fields.

17. Agway admits in its Royal Hybrid 2073 Narrative that 2073 fields near Fairdale, North Dakota were inspected July 9, 1999, and it was apparent that many seedlings had not emerged. Also, the plants that had downy mildew symptoms were often found next to non-emerged seeds. Royal Hybrid Narrative (Blue Binder) at 5.

18. The video tapes presented by Agway also showed some downy mildew problems, and other evidence showed downy mildew problems too, but downy mildew doesn't appear to be the very serious problem that Agway claims it is. Downy mildew ("DM") is a disease problem independent of hybrid. In other words, the incidence of DM is independent of the hybrid because none have resistance to the new races of DM now found in confection sunflowers. Therefore, if 2073 has very significant DM problems other nearby hybrids should have very significant DM problems, too. *See* Agway's December 30, 1999, written materials. ("Thus, comparison of different hybrids show the same significant problem of downy mildew.") Yet, the evidence presented in this matter does not show this to be the situation. Agway claims that DM had significant effect on most, if not all, of the 63 growers' 2073 fields. Yet, the evidence shows that only in 2073 fields were there the significant yield reductions that other hybrids did not experience (at least not as widespread as 2073). Clearly, DM was not the serious culprit in 2073 fields that Agway claims. If it was it was very selective. For example, Agway 3703 was tested to be more susceptible to DM than 2073, yet fields side by side show low yields of 2073 and

normal yields of 3703. Petitioner's Written Statement, Exhibit 7. The NDSU Langdon trials show that 2073 is not extremely susceptible to DM.

19. Undoubtedly, there were DM problems and other environmental problems with 2073 and other varieties of confection sunflower in 1999, related to a wet year, blackbirds, deer, *etc.* There were likely multiple problems faced by many of the 63 growers in 1999. However, it would have had to have been a widespread catastrophic combination of DM, blackbirds, deer and/or other environmental problems, specific only to 2073, to explain the differences in yield losses for 2073 with all 63 growers. One cannot accept Agway's explanations. The evidence just does not show that to be the situation. It is implausible that drought, birds, weeds, excess water, rabbits, deer, or disease selectively attacked 2073 to the extent Agway claims that they did, but did not attack other varieties to that extent.

20. Stand Counts (number of sunflower plants per acre) are a measure of germination success. Stand counts for 2073 were made by Agway, the growers, and the growers' consultants. Agway's stand counts for 2073 are suspect. Both Agway's stand count maps and the stand counts it made on video tape appear to be suspect. Looking at tapes made by Agway and tapes made by the growers is like experiencing night and day, they are so different. Obviously, someone's tapes do not reflect the real situation. Obviously, someone's stand counts do not reflect the real situation. It appears that Agway sampled one spot as opposed to sampling several spots (one Petitioner consultant sampled 10-15 spots). Some Agway stand counts were made near power line poles where double seeding occurs. Sometimes Agway may have videotaped the wrong field or variety in the field. Agway may have selectively avoided fields where DM was not present. However, the failure to emerge occurred in fields with DM as well as fields without

DM. One of Agway's premises, that defective seed would exhibit a completely random stand loss pattern, fails if Agway begins with selected fields or portions of fields.

21. Agway claims that many growers contacted Agway much too late in the season for Agway or any other independent entity to dig up and examine seed so as to be able to scientifically determine all the causes of 2073 stand count problems. It says that many growers did not contact Agway until between late December 1999 and February 2000, long after fields had been harvested or destroyed and ground worked in preparation for the upcoming spring. To some extent this is true. Many growers did notify Agway late, but many others notified Agway early and were ignored. For only a few growers did Agway complete inspections for fields. Agway did make field visits with some of the growers who contracted directly or indirectly with them, but not with others. Some growers who did contact Agway early were put off or dismissed for long periods of time. Even for those growers with whom Agway conducted tests, Agway was little concerned about examining the seed and determining seed problems. Agway from the outset focused on above ground problems. Agway did, however, conduct emergence tests of 2073 in the fields of some growers in 1999. When 2073 failed to emerge (it had emergence problems), Agway claimed other causes such as pests, disease, or other environmental conditions.

22. The results for 2073 in 1999 were pretty uniform, at least as to these 63 growers. In fact, they were pretty uniform for all the growers in Groups A, B, and C. The results were uniformly poor yields for 2073 regardless of the varying types of conditions in land areas and varying environmental conditions throughout the state in 1999. Agway 2073 large and extra large seed seemed to have the most problem, but the problem was also, to a lesser extent, with Agway 2073 medium seed.

23. The growers had official samples from seven closed bags of Agway 2073 seed, from seven different seed lots, tested by the Seed Testing Laboratory at the Seed Science Center of Iowa State University, Ames, Iowa (the “Laboratory”). Apparently, the Laboratory is the most preeminent seed testing laboratory in the nation. At least the Petitioners claim this and there was no evidence to the contrary about the prestige of the Laboratory. Five of the tested bags were large seed, one was extra large, one was medium. Three tests were performed on each of the seven samples, a germination test which included an analysis of abnormal seedlings as well as dead seed, a Tetrazolium (“Tz”) test, and a cold germination test. The tests were conducted by a Registered Seed Technician, assisted by a pathologist. The seed technician was under the supervision of Dr. Susana Goggi. *See* Petitioner’s Written Statement, at 4-6; and corresponding Exhibits 2-4. In the Petitioners’ Response to Agway’s Supplementation and Response, the Petitioners also include a statement from Dr. Denis C. McGee, Professor of Plant Pathology, Seed Science Center, Iowa State University. The tests from the Laboratory conclude that Alternaria alternata, which is a saprophyte to a weak pathogen, was present in unusually high concentrations in all of the seed. The Laboratory tests show that it is clear that the growers’ contentions of dead seed, rotting seed, and extremely low vigor seedlings and plants have a basis in fact. The tests show germination rates from 26 percent (extra large seed) to 64 percent (medium seed), abnormal seedlings from 25 percent to 49 percent, and dead seed from 7 percent to 25 percent. The Tz test showed high/medium seedling vigor of 21 percent to 59 percent (medium seed), low vigor of 27 percent (medium seed) to 60 percent, and dead seed from 13 percent to 19 percent. The testers saw many seedlings with stubby primary root development and no sign of secondary root development and some with signs of primary infection of the hypocotyl. *See id.*, Exhibit 4. None of the seed tested at the 85 percent germination rate claimed

by Agway. The evidence offered by the Petitioners in regard to germination rates for 2073 for the 1999 growing season is more credible than the evidence offered by Agway.

24. On its seed label for 2073 Respondent provided a written statement or warranty that its seed would have at least an 85 percent germination rate (most labels stated 85 percent, some stated 90 percent). Respondent also conspicuously provided on all of its seed bags the following notice:

NOTICE TO BUYER: Exclusion of Warranties and Limitation of Damages and Remedy

“We warrant that this seed conforms to the label description, as required by federal and state seed laws. WE MAKE NO OTHER WARRANTIES, EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE.

LIABILITY for damages for any cause, including breach of contract, breach of warranty and negligence, with respect to this sale of seeds is LIMITED TO A REFUND OF THE PURCHASE PRICE OF THE SEEDS. THIS REMEDY IS EXCLUSIVE. IN NO EVENT SHALL WE BE LIABLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF PROFITS.”

Respondent’s Exhibit 1. From actual Agway seed bag (emphasis substantially as in the original).

25. Agway also added additional commitments or warranties beyond what was printed on the label. For example on Agway’s web page it states:

- Royal Hybrid 2073 Rust Tolerant (new).
- Confection hybrid
- **Improved yield over Royal Hybrid 3703** [3703 was described on the same page as having been the #1 sunflower in 1995 and having achieved 2,956 # in Minot]
- Rust-tolerant hybrid
- Long-seeded confection in demand by processors
- Very high percentage of large seed
- Very good stalk strength
- **Improved plant health**
- Short bloom for 3-way hybrid

(Emphasis supplied.)

26. There is some evidence that there may have been more environmental problems than normal statewide in 1999. Yet, there is not enough evidence to determine the amount of the effect that environmental problems had upon the yield loss of the Petitioners' 2073. It is appropriate to note that the environmental problems had an effect on all sunflower hybrids but in some situations the effect could have been greater than in others.

CONCLUSIONS OF LAW

1. Agway, the Respondent, is a seller of goods in North Dakota to each of the Petitioners. *See* N.D.C.C. § 41-02-03 and 41-02-05(5). The Respondent sold goods to each of the Petitioners either directly through written contract or indirectly through distributors and private labelers. *See* N.D.C.C. § 41-02-08.

2. In a 1984 seed case, Hagert Farms sued Hatton Commodities for seed diseased with "halo blight" under theories of negligence, breach of warranty, and strict liability. The negligence claim was withdrawn. The North Dakota Supreme Court held that economic loss, as distinguished from injury to property, may not be recovered under a theory of strict liability in tort but may be recovered under express or implied warranty under the Uniform Commercial Code (N.D.C.C. Title 41). *Hagert v. Hatton Commodities, Inc.*, 350 N.W.2d 591, 595 (N.D. 1984). Therefore, the Petitioners may have a claim for recovering economic loss against the Respondent under either a claim based on express or implied warranty.

3. In this matter, the Petitioners loss can best be ascertained by comparing the crop that is produced with the one that would in all reasonable probability have grown and matured had the seed germinated properly. *McLane v. F.H. Peavey & Co.*, 8 N.W.2d 308 (N.D. 1943), cited in *Hagert*, 350 N.W.2d 591. Because of the inherent difficulties in proving consequential

damages, reasonable proof under the circumstances is all that is required. *Leininger v. Sola*, 314 N.W.2d 39, 46 (N.D. 1981).

4. In this matter, the Petitioners have presented both direct and circumstantial proof that Agway 2073 was defective seed for the 1999 growing season and they have presented reasonable bases for calculation of damages. By providing evidence of actual comparable fields grown with other sunflower seeds, under the same or virtually similar methods, they have shown how much their yield would have been in all reasonable probability.

5. Parties alleging a breach of warranty have the burden of establishing the existence of a warranty, a breach of warranty, and that the breach of warranty proximately caused the damages alleged. *Hagert v. Hatton Commodities, Inc.*, 384 N.W.2d 654, 657 (N.D. 1986).

6. Respondent made an express warranty to the Petitioners that its 2073 seed would germinate at, at least, an 85 percent (in some cases 90 percent) germination rate. Respondent's seed was defective seed, being infected with alternaria alternata. It likely did not germinate at an 85 percent rate for most if not all of the Petitioners. Tests from the most reliable source of testing, the Laboratory, show that none of the seed germinated at an 85 percent germination rate.

7. Generally, Agway breached the express warranty that its 2073 seed would germinate at an 85 percent germination rate. Generally, it also breached an express warranty of improved yield over Royal Hybrid 3703 and that 2073 would have improved plant health. When the Laboratory tests, the growers stand counts and the growers yield losses are considered. Agway can be said to have specifically breached its express warranty with regard to each of the Petitioners. Essentially, Agway's defective seed caused the Petitioners' damages.

8. Agway expressly and conspicuously disclaimed any other warranties, express or implied, of merchantability, fitness for a particular purpose, or otherwise by its statement on the seed bag. *See* FOF #24.

9. On all of its 2073 seed bags, apparently, Agway also limited the remedies for the sale of its seed for any breach of warranty to a refund to the purchase price of the seeds. *See* FOF #24.

10. N.D.C.C. section states, in part, as follows:

41-02-98. (2-719) Contractual modification of limitation of remedy.

1. . . . :

- a. The agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter. . .
- b. Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
2. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title.
3. Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable

Emphasis supplied.

11. North Dakota law calls for an award of consequential damages resulting from the seller's breach for any loss from a general or particular requirement of the contract which the seller knew, or had reason to know, at the time of contracting, and which could not be reasonably prevented by cover. N.D.C.C. § 41-02-94.

12. The Petitioners have consequential damages, economic loss, that they have shown. Agway provided defective seed to the Petitioners that did not germinate an 85 percent germination rate as stated in the express warranty. Agway should be liable for its breach of express warranty. However, Agway has conspicuously stated that it is limiting the remedy to an exclusive remedy of the purchase price of the seed. At the least, then, even under such a

limitation, the Petitioners are entitled to be compensated by Agway for the purchase price of every bag of seed that they purchased from the Respondent. Nevertheless, in this matter it is unconscionable for Agway to limit its remedies for breach of express warranty. *See* the Uniform Commercial Code's official comment to section 2-719 (N.D.C.C. § 41-02-98). Agway's limitation would deprive the growers of minimum adequate remedies for breach and should not be enforced. When an express warranty is provided the grower must be able to rely on it. A grower who relies on express warranties to plant what he assumes will be good seed cannot tell if the seed will be good until he expends considerable money on planting and other inputs. He may still get a good crop from defective seed if some of the seed that emerges and yields well. But, whether the seed is defective or not, the farmer is not able to tell if the seed will produce as warranted until much later, until he spends much in time and money to discover the results of planting. Therefore, it would be unconscionable for the seed company to expressly warrant certain results and then expect the farmer to bear the loss of bad seed, *i.e.*, what he has to spend (above the cost of the seed) to find out the results. The defect in the 2073 seed was latent. The growers could not test the seed upon buying it (at least not without considerable extra expense and considerable time wasted). Some were even provided with 2073 after they had bargained for a different variety. The grower should be afforded a reasonable remedy. In this situation it would be unconscionable to allow Agway to exclusively limit the remedy to the purchase price of the seed.

13. Agway's disclaimers of any other warranties, *e.g.*, warranty or merchantability, is not unconscionable.

RECOMMENDATION

There was no resolution of any of the issues at the arbitration hearing. Therefore, the Petitioners must prove, by the greater weight of the evidence, that 2073 is defective seed, that Agway is responsible for the 2073 defective seed, and that Agway is liable to pay the Petitioners consequential damages resulting from the defective seed. Petitioners have met their burdens of proof. Accordingly, based on the proposed findings of fact and conclusions of law, the ALJ proposes that the Board RECOMMEND that the Respondent pay the Petitioners the total amount of the loss that they claim (individually, the amount of loss that each Petitioner claims) but not the interest on the loss nor the RMA-USDA calculable loss. The ALJ recommends an amount of \$1,731,920.89 be paid in damages to the 63 Petitioners. *See* Petitioners' Written Statement, Exhibit 1 which also provides the amount of each growers individual loss. Even though the Petitioners' method of calculating loss is reasonable under the circumstances, because it is not certain in the case of each petitioner whether the actual amount of lost yield was entirely due to the defective seed, the ALJ believes that it would likewise be unconscionable to recommend that interest and loss for lower average yields and higher crop insurance premiums also be paid by Agway. The actual amount of comparable field loss yield for the acres planted by Petitioners is sufficient compensation. Though this recommendation is arbitrary, to some extent, it is based on a showing that it is impossible at this time to determine with complete accuracy how much of the yield loss is actually due to the defective 2073 and how much is due to environmental conditions for each grower on that particular land where 2073 was planted. Although it can be argued that the total amount claimed of \$1,824,725.44 is a reasonable amount, and the best way to determine damages under the circumstances, because of this lingering uncertainty the ALJ cannot recommend adding what would ordinarily be reasonable, logical additional losses.

Further, the ALJ proposes that the Board RECOMMEND that its decision is only as to the Petitioners in this matter and that it will make no statement to the effect that seed arbitration is not a prerequisite to the initiating of any civil court action.

Dated at Bismarck, North Dakota, this 30th day of April, 2000.

State of North Dakota
Seed Arbitration Board

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